IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.8165 OF 2006.

B.G.Ahuja. ... Petitioner.

Versus.

Executive Engineer, National Highway Division No.V, Pune. ... Respondent.

The Petitioner-in-person.

Ms.Mhaispurkar, A.G.P. for the Respondent.

CORAM : ABHAY S.OKA, J.

DATED : 13th June, 2007.

P.C.:

1. Considering the controversy involved in the writ petition, the same was taken up for final disposal at admission stage. By this Writ Petition under Article 227 of the Constitution of India, the Petitioner has challenged the orders passed by the trial Court on 23rd August 2005 and 21st December 2005.

2. It will be necessary to briefly refer to the facts of the case. The Petitioner appearing in person is the Defendant in a Civil Suit filed by the Respondent. In the said civil suit, the prayer made by the Respondent is for a money decree in the sum of Rs.2,73,632/- together with interest thereon at the rate of 18% per annum. The present Petitioner filed a Written Statement contesting the claim of the Respondent. In the said Written Statement, the present Petitioner made a counter-claim. The said Written

Statement-cum- counter-claim is at Exh.8. On the said counter-claim, the trial Court passed an order on 16th March 1996 directing the Petitioner to pay deficit Court fees. The Petitioner made an application at Exh.11 on 16th March 1996. In the said Application the Petitioner contended that the ascertained claim in the counterclaim is of the sum of Rs.5,37,832/- and the balance claim was not yet ascertained. In the said Application, the Petitioner stated that he was ready and willing to pay the Court fees on the claim of Rs.5,37,832/- and was also willing to pay Court fees on the balance claim after the same was ascertained by the Court. On 26th March 1996 the learned trial Judge rejected the said Application on the ground that the counterclaim made by the Petitioner has been already rejected.

3. The Petitioner made one more Application at Exh.22 on 11th July 2003. In the said Application a prayer was made for issuing necessary orders for working out the Court fee by the Taxing Officer/Officer of the Court. In the said Application, the Petitioner was reiterated that he was ready and willing to pay the Court fee on the claim of Rs.5,37,832/- and the Court fee for the balance claim would be paid after the decree was passed by the trial Court. The said application was disposed of by the Court by directing the Superintendent of the Court of Civil Judge, Senior Division to

calculate the amount of Court fee as per the counter claim and to submit the amount of the Court fee to be paid by the Petitioner-Defendant. However, by a further order passed on the same day, the said order was suspended. Another Application at Exh.26 was filed by the Petitioner on 25th July 2003. In the said Application, the Petitioner prayed that the order dismissing the counter-claim may be set aside. The learned trial Judge by order dated 21st December 2005 rejected the said Application by observing that the Application was filed after long lapse of time. This is one of the orders impugned in this writ petition.

4. The Petitioner made an application at Exh.19 praying for framing of additional issues. The said application was rejected by the learned trial Judge by order passed on 21st December 2005. This is the second order which is the subject matter of challenge in this writ petition.

5. An Application was filed by the Petitioner at Exh.30 praying that the issue regarding the limitation be tried as a preliminary issue. The said Application was rejected by the trial Court which is the third order impugned in this writ petition.

6. I have heard the submissions of the Petitioner

appearing in person and the learned A.G.P. for the Respondent. In so far as the order passed below Exh.30 is concerned the learned trial Judge has rejected the said application by holding that the issue regarding the limitation cannot be framed as a preliminary issue. I find no error in the said order. The issue of limitation is always a mixed question of law and facts and the said issue will have to be decided after the parties lead evidence in the suit. The learned trial Judge was justified in rejecting the prayer made by the Petitioner for framing the preliminary issue.

7. In so far as the order passed below Exh.19 is concerned, it is in the nature of an interlocutory order. By the said order the learned trial Judge has declined to frame additional issues. In the event the decree passed by the trial Court in the suit is adverse to the Petitioner, while preferring an appeal against the decree, the Petitioner can always challenge the said order passed below Exh.19.

8. In so far as the issue regarding restoration of the counter-claim is concerned, the prayer made in the counter-claim read thus:

> "(i) The Plaintiff be directed to pay amount of counter claim of Rs.3 lakhs as damages

claimed in the year 1976 with interest at 18% on Rs.3 lakhs i.e. Rs.3.00 lakhs + Rs.9.36 lakhs = Rs.12.36 lakhs.

(ii) The Plaintiff be directed to release the amount on account of work done but not paid by the plaintiff from the year 1974 to the year 1976 with interest at 18% from June 1976 i.e. Rs.1,12,635 + Rs.3,54,690.

(iii) The Plaintiff be directed to release Security deposit kept in the FDR in the Joint Account with the Sangli Bank Ltd. Pune-2.

(iv) The Plaintiff be directed to pay the loss in profit which he would have otherwise earned in completing the work which amounts to Rs.49,007/- + interest at 18% from June 1976.

(v) The Plaintiff be directed to pay compensation for harassment and mental torture of Rs.5 lakhs."

While rejecting the prayer for restoration of the

counter-claim, the learned trial Judge has held that the counter-claim was dismissed in the year 1996 and therefore, the Application filed in the year 2003 was belatedly filed and no steps were taken by the Petitioner from the year 1996 onwards for restoration of the counter-claim. It must be noted here that on the date on which the counter-claim was rejected i.e. 16th March 1996, the Petitioner filed an Application at Exh.11 offering to pay Court fee on Rs.5,37,832/- and to pay Court fee payable on the balance amount after the same was ascertained. The said application was not entertained on the ground that the counter-claim was already dismissed. In the Application at Exh.24 made by the Petitioner on 11th July 2003, a direction was given by the trial Court to the Superintendent of the Court to calculate the amount of Court fee payable on the counter-claim. The Application at Exh.24 made on 11th July 2003 was entertained by the trial Court. It appears that on the same day the learned trial Judge suspended the order passed on the said Application. The said application at Exh.24 has remained pending till today. The Application for restoration of the counter-claim was made on 25th July 2003. The learned trial Judge rejected the said Application only on the ground of delay. In my view considering the earlier steps taken by the Petitioner by filing applications at Exhibit 11 and 24, the learned trial Judge ought to have

restored the counter-claim subject to the Petitioner paying Court fee payable on the counter-claim. On the very day on which the counter claim was dismissed, the Petitioner had made an application and expressed his willingness to pay Court fee on the counter-claim.

9. Therefore, the order passed by the trial Court below Application at Exh.26 deserves to be quashed and set aside. Time will have to be granted to the Petitioner to pay the entire amount of Court fee payable on the counter-claim on the date on which the same was filed. After the Court fee is paid by the Petitioner, the trial Court will verify whether the Court fee paid by the Petitioner is proper and after due verification, the trial Court will proceed to decide the counter-claim in accordance with law after giving opportunity to the Respondent to file written statement to the counter-claim.

10. Hence the following order is passed:

(i) The order passed below Application at Exh.26 is quashed and set aside.

(ii) The counter-claim contained in the written statement filed by the Petitioner at Exh.8 is restored subject to condition that the

Petitioner will pay the entire amount of Court fees payable on the counter-claim within a period of eight weeks from today.

(iii) If the Court fee amount is paid by the Petitioner within the stipulated time, the trial Court will verify whether the Court fee paid by the Petitioner is proper. It is made clear that if the entire Court fee payable on the counter-claim is not paid by the Petitioner within the period of eight weeks from today,the order of dismissal of the counter-claim will stand.

(iv) If the counter-claim is restored, the Respondent will file written statement to the counter-claim within a period of six weeks from the date of payment of Court fee by the Petitioner.

(v) The other impugned orders are confirmed subject to what is stated above.

Judge.